by filing an application for the renewal of the writ under Order 8 rule 1.

I would only refer to a passage in *The Annual Practice* 1957 at page 60 which reads:— "Although the court has power to enlarge the time under O. 64 r. 7 the practice is not to do so after the expiration of twelve months from the date of the writ, or of six months from the date of last renewal, where, but for such enlargement of time, the plaintiff's claim would be barred." The deceased died on 5th May, 1961. By the time the writ was served by substituted service on or after 25th November, 1964, the period of three years had elapsed — see section 7(5) of the Civil Law Ordinance, 1956.

I therefore order that the application of defendant be granted and the application of the plaintiff be refused. Costs for defendant.

Order accordingly.

Solicitors: *Wrigglesworth & Co.; N. Ramachandran.*

THEN THAW EN & ANOR. v. WONG JUAT ENG

[A.C.J. (Harley J.) April 2, 1965]

[Kuching — Civil Appeal No. K 2 of 1965]

Landlord and Tenant — Subletting — Whether person given occupation of premises a subtenant or a mere licensee — Rent Control Ordinance (Cap. 86), s. 15(1)(b) & (j).

The appellant had applied for possession of premises from the respondent on the ground that there was a breach of the term not to assign or sublet and also that the respondent had received a sum by way of rent from a subtenant which sum exceeded in the aggregate 75% of the rent paid by the lessee. The respondent did in fact receive $300 per month from a person who occupied the ground floor of the demised premises. She contended however that there was no subtenancy given but a mere license.

Held: in the absence of a holding over or any special circumstances in this case, the respondent must be held to have sublet the premises and as there was no evidence of permission being given for such subletting, the appellant was entitled to possession of the premises.

Cases referred to:—

(1) *Addiscombe Estates Ltd.* v. *Crabbe* [1957] 3 All E.R. 563 at p. 570.

(2) *Dealex Properties* v. *Brooks, The Times,* March 2, 1965.

(3) *Marcroft Wagons* v. *Smith* [1951] 2 K.B. 496.

(4) *Errington* v. *Errington* [1952] 1 K.B. 290.

(5) *Murray Bull & Co.* v. *Murray* [1953] 1 Q.B. 211.

(6) *Kew Man* v. *Cheah Yee Eng* [1963] M.L.J. 140.

(7) *British & Malayan Trustees Ltd.* v. *Happy World Ltd.* [1963] M.L.J. 380.

(8) *Ministry of Agriculture & Fisheries* v. *Matthews* [1950] 1 K.B. 148.

MAGISTRATE'S CIVIL APPEAL.

T. O. Thomas for the appellants.

Respondent in person.

Cur. Adv. Vult.

Harley J.: The appellant is the landlord (by succession in title from a previous landlord) of certain premises subject to the Rent Control Ordinance Cap. 86, and respondent is his lessee. By the terms of a written registered lease, made with the previous landlord, the lessee pays $70 monthly by way of rent, and it was a term of the lease that the lessee should not assign or sublet the demised premises or any part thereof without the consent in writing of the landlord.

The landlord gave notice to quit and claimed possession of the premises from the lessee on the grounds that there was a breach of the term not to assign or sublet (section 15(1)(b) of Cap. 86), and also that the lessee received a sum by way of rent from a sub-tenant which sum exceeded in the aggregate 75% of the rent paid by the lessee (section 15(1)(j) of Cap. 86). It was undisputed that the lessee did in fact receive $300 per month from one Teng Boon King who occupied the ground floor of the demised premises.

The lessee (now respondent) denied that a sub-tenancy existed or that the $300 received was "rent". She contends that a mere licence was granted to one Teng Boon King by herself, and further that the previous landlord (one Liu Si Moi) had given verbal assent to her (the lessee) to grant a licence to any person to use the ground floor.

The main grounds of appeal are:—

(1) That the learned trial magistrate erred in taking into consideration parol evidence inconsistent with the written document contrary to his ruling that such evidence was not admissible.

(3) That Teng Boon King should have been held to be a tenant on the whole of the evidence and particularly because he was in exclusive possession of the ground floor of the premises paying $300 per month.

(5) That the learned magistrate misdirected himself in holding it unreasonable to make any order against the defendant for possession, reasonableness having been not in issue.

Paragraph 4(c) of the defence read as follows:—

> "There was no subletting as such of the premises at a rent in excess in aggregate of 75% of the rent paid by the defendant. The defendant did, in fact, have the permission of Liu Si Moi (the previous landlord) to grant licence and no limit or restrictions as to what amount of licence fee may be collected was imposed."

The learned magistrate ruled in relation to this point in the defence that evidence of the

alleged verbal permission or assent was inadmissible. In his judgment the learned magistrate held:

"The plaintiffs (appellants) know of no permission to sub-let or to grant licenses. The defendant (respondent) alleges that she obtained verbal permission from Madam Liu Si Moi in October 1960. Madam Liu has died sometime last year. The verbal permission was to sub-let the two upstairs rooms and to grant a licence in respect of the ground floor. The defendant wished to call evidence to describe how she called upon the then landlord Madam Liu Si Moi and obtained the verbal permission. This court would not allow the witness, who in any case was not immediately available, to contradict the terms of a written contract by parol evidence. There can be no ambiguity — the agreement *Ex. 1* clearly requires a written consent to sub-let and the court was not prepared to hear parol evidence of a collateral agreement which contradicts and is inconsistent with the written document.

Odgers on Construction of Deeds and Statutes, 3rd Edn. at page 80 has this to say: Evidence of collateral agreement:— 'although evidence may not be given with the object of adding to a written contract still evidence of a collateral agreement may be given and the parol agreement and the writing must be construed together as forming one contract. This in effect in many instances adds to the written agreement, *but it must not contradict* or be inconsistent with the written document'."

However, having ruled that evidence of permission obtained from the previous landlord was inadmissible, the learned magistrate later in his judgment appears to contradict himself. The continuation of the judgment reads:

".....having heard the defendant I am satisfied that she was telling the truth about having obtained a verbal permission.

Having heard all the evidence and considered both the facts and the very complex law on the subject I am satisfied on a balance of probabilities that the defendant was in breach of the written agreement and is caught by the provisions of section 15(1)(b).

However in view of my finding of her having obtained a verbal consent, albeit one which gave no legal authority to her to sublet or grant a licence I do not consider it reasonable to make any order against her for possession."

Apart from the fact that the learned magistrate took into consideration inadmissible evidence, his finding that there was a breach of section 15(1)(b) must imply that there was a sub-letting. Yet in another part of his judgment is a direct finding that in fact there was no sub-letting. This part of the judgment reads as follows:

"Having very carefully considered the law and the evidence before me I find that the facts are more consistent with Mr. Teng being a licensee, particularly in view of the statutory declaration which draws a clear distinction between the sub-lessee and the licensee. I hold then that on a balance of probabilities Mr. Teng occupies the ground floor of the premises on the authority of a licence, in other words is a licensee so that the payments he makes of $300 are not rent but are in respect of a licence granted him by the defendant.

It follows then that the defendant is not caught by the provisions of section 15(1)(j)."

This court will now have to review the question whether the lessee's agreement with Teng Boon King constituted in fact a sub-lease or a licence.

Before the case was brought to court, the lessee had made a statutory declaration called for by the landlord under section 17(1) Cap. 86. The relevant part of that declaration reads as follows:—

"I have permitted by Licence dated 23rd August, 1962, the occupation of the whole of the ground floor, with the common use of the bath-room, lavatory and kitchen on the said ground floor, to one Teng Boon King of No. 126, Padungan Road, Kuching, at a monthly licence fee of dollars three hundred only ($300.00)".

The relationship between the parties must be determined by the law and not by the label which one party chooses to put on it. The suggestion that the contract created a licence and not a sub-lease arises from the use of the word licence in the statutory declaration. In *Addiscombe Estates Ltd.* v. *Crabbe*,[1] Jenkins L.J. quoted with approval from a judgment of Denning L.J.:

"We have had many cases lately where an occupier has been held to be a licensee and not a tenant. In addition to those which I mentioned in *Errington* v. *Errington & Woods* ([1952] 1 All E.R. 149) we have recently had three more. *Gorham (Contractors), Ltd.* v. *Field* (unreported), *Forman* v. *Rudd* (unreported), and *Cobb* v. *Lane* ([1952] 1 All E.R. 1199). In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all. In the present case, however, there are no special circumstances. It is a simple case where the employer let a man into occupation of a house in consequence of his employment at a weekly sum payable by him. The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put on it (and he cites *Customs & Excise Comrs.* v. *Pools Finance* [1952] 1 All E.R. 775). It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven — I will not in these days say a coach and four — but an articulated vehicle."

The evidence called in the instant case was as follows:—

Teng Boon King, "I occupy the entire ground floor of the premises at No. 172. I pay $300 a month to the defendant. I did have some document allowing me to occupy the ground floor. I have not got it with me now. I have been a tenant in these premises for over 2 years. I have always paid $300 rent to the defendant."

The evidence of the lessee (respondent) was that the previous landlord:—

"gave me verbal permission to grant a licence for the occupation of the entire ground floor. There is no writing only a verbal consent. I have been receiving

$300 rent from Mr. Teng who occupies the ground floor. I have been paying $70 rent to the plaintiffs.

Xxd: Madam Liu (the previous landlord) gave me no consent in writing to sub-let the premises. This was so because she was illiterate. The memorandum of sub-lease was prepared in the lawyer's office."

That the "memorandum of sub-lease" was not produced is rather surprising. The learned magistrate held that there was no sub-lease but that Mr. Teng occupied the ground floor of the premises on the authority of a licence.

It used to be considered that there was a demise when a right was granted to the exclusive possession of a dwelling-house or part of a dwelling-house. It is true that Rent Control legislation has given birth to possessory licences, statutory "tenancies" and other anomalies. In the present case, has some special Rent Act relationship, or on the other hand a normal contractual relationship, been created?

Rent Acts did create new meanings for tenant and tenancy. Moreover "the ordinary common law inference that a contractual tenancy is created by the acceptance of rent did not apply where the premises had the protection of the Rent Acts", (*Dealex Properties* v. *Brooks* [2]). Any *dictum* must be referred to its particular context: the Court of Appeal was considering the position when an occupier holds over from a (statutory) tenant. In such cases of holding over, even though the landlord accepts regular payments in the nature of rent, the occupier may be a licensee only and not a tenant (*Marcroft Wagons* v. *Smith* [3]). In special circumstances "contractual licences" in respect of protected premises may be created as in *Errington* v. *Errington,* [4] and *Murray Bull and Co.* v. *Murray;* [5] but these were cases in which the facts made it plain that whatever may have been the intended relationship of the parties, it was not that of landlord and tenant. As was said in *Dealex Properties Ltd.* v. *Brooks, supra,* by Diplock L.J. "It was plain that in Rent Act cases, if the acceptance of rent could be explained on another ground than intention to create a contractual tenancy, such a tenancy should not be inferred."

In the instant case, there is no hint as between lessee (respondent) and Teng Boon King of a holding over or of any special circumstances. One has to fall back on the nature of the contract, the intention of the parties, and *quo animo* the rent was received. It is to be regretted that in the instant case the learned magistrate did not explicitly consider what was the intention of the parties. Persons who inhabit premises with exclusive possession can sometimes be mere licensees (*Kew Man* v. *Cheah Yee Eng* [6]) but see on the other side *British and Malayan Trustees Ltd.* v. *Happy World Ltd.* [7] In the case now before this court, merely because "licence" was mentioned in the statutory declaration seems to be altogether insufficient reason to depart from basic principles.

Over a period of two years the relationship between the lessee and Teng Boon King bore all the indiciations of a tenancy relationship. There was no evidence of a licence agreed to continue for only a limited time, as was the case in *Marcroft Wagons* v. *Smith, supra.* In the rare cases where an occupant has had exclusive possession in return for payments in the nature of rent, a licence has been held to exist only when the occupant has held over from a previous tenant. When an occupant originally moves into exclusive possession for a determinate term, (i.e. when a new occupant is let in) in return for yearly or monthly payments, such an arrangement constitutes a tenancy. One exception is when the person in possession has no power to grant a tenancy (*Ministry of Agriculture and Fisheries* v. *Matthews* [8]) but that is not the case here. In this case the lessee granted a sub-tenancy because in her own words "I did not know I was not allowed to receive rent in excess of 75% of the rent I pay to the landlord." The acceptance of rent in fact has not been, and cannot be, explained except on the footing that a contractual tenancy existed. Clearly, the appellant may invoke in aid section 15(1)(j) of Cap. 86, but, since the relationship between landlord (appellant) and lessee (respondent) is a contractual one, a specific permission to sub-let might well cover a sub-letting even at the excessive rate. However there was in fact clearly no such permission, and therefore the appellant is entitled to possession under section 15(1)(b). I do not think that it could be held that consent to sub-let was unreasonably withheld (if this be a relevant consideration), because such consent in fact was never requested. On the general question whether it was reasonable to give possession the learned magistrate, if I may say so with respect, misdirected himself. There was no evidence of hardship suffered by the respondent, and she stands to lose nothing except the continuation of her illegal profits. In all the circumstances an order for possession is eminently reasonable.

This appeal is allowed. The order for possession, rent and mesne profits as originally prayed in the plaint is granted to the appellant. Respondent must pay the costs both of the present appeal and in the court below. The court will hear argument as to the date for giving up possession.

Appeal allowed.